

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-1474

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha",
a/k/a "Sha", and ERNEST GEORGE TEPPER, a/k/a
"Born Freedom",

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

GERALD ZUCKERMAN

Attorney for Defendant-Appellant Norman Stanley Caldwell

36 West 44th Street
New York, N. Y. 10036
(212) 682-5315

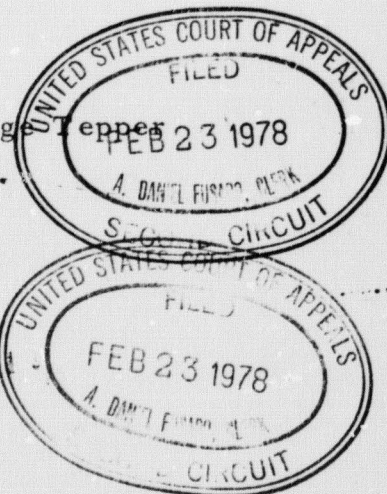
DUDLEY GAFFIN

Attorney for Defendant-Appellant Ernest George Tepper

233 Broadway
New York, N. Y. 10007
(212) 962-5757

ROBERT B. FISKE, JR.

United States Attorney
Attorney for Plaintiff-Appellee
One St. Andrews Plaza
New York, N. Y. 10007



(6986)

PAGINATION AS IN ORIGINAL COPY

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A-1

DOCKET ENTRIES FOR NORMAN STANLEY CALDWELL

CRIMINAL DOCKET - U.S. District Court

0208 1 0844 CALDWELL, NORMAN STANLEY 07 08 77 0517 01
a/k/a "Alah Masha", a/k/a "Sha" 03

U.S. DISTRICT COURT
18:371

Consp. to commit bank robbery

18:371
18:2113(a)

Consp. to commit bank robbery
Attempted bank robbery

77-824
BAIL - RELEASE

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT XX	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began *6/30/77 Summons Served First Appearance 7/1/77	Information ☐ Appeared on Writ ☐ Indict. Waived ☐ Superseding Indictment ☒ In Charging District 9-6-77	1st Plea 7-14-77 Final Plea	Trial Set For Trial Began Trial Ended	Disposition of Charges ☐ Convicted ☐ Acquitted ☐ Dismissed ☐ On Government Motion ☐ On All Charges ☐ On Lesser Offense(s) ☐ WOP: ☐ WP

SEARCH WARRANT	DATE	INITIAL NO	INITIAL APPEARANCE DATE	PRELIMINARY EXAMINATION OR REMOVAL HEARING	OUTCOME
Issued Returned Served At Court Completed	7/1/77	MJ08AB	7/1/77 7/11/77	☒ X ☐ ☐	MJ08AB HELD FOR HELD FOR OTHER PROCEEDINGS

BANK ROBBERY: 18 USC 371, 18 USC 2113(a)(d)

U.S. Attorney or Asst.

Lee S. Richards
791-1989

ATTORNEY AT LAW XX

Hudson-Reid-
377-Broadway, N.Y.C. 10043
964-9452-

Gerald Zuckerman
36 W. 44th St
NY, NY 10036
682-5315

Bonner-02, Tepper-03

DATE	PROCEEDINGS	EXHIBIT DE AT
7/1/77	Deft. presented, CJA Hudson Reid assigned 377 B'way NYC, Deft. remanded in lieu of \$35,000 C/S with PSA supervision.	
7-8-77	INDICTMENT FILED, 77 CR 517Ward, J.	
7-14-77	Deft. (atty. not present) Court directs entry of a not guilty plea. Deft. continued remanded in lieu of bail of \$35,000 cash or surety previously fixed by Magistrate. 10 days for motions. Case assigned to Tenney, J. for all purposes.Ward, J.	
07-20-77	Pre-trial conf. held. Trial 9-17-77 at 10AM. Tenney, J.	2 7-20 E 1
08-15-77	Filed Stip&Order motion presently scheduled for 8/10/77 ,9:30 be adjourned until 8/24/77,9:30 A.M.	
08-15-77	Filed Govt's Memorandum of Law in opposition to deft. Tepper's Omnibus Pre-Trial motions.	
08-24-77	Filed Govt's Memorandum of Law in opposition to deft. Tepper's omnibus Pre-Trial Motions with affdvt of service by Harold Davis on Dudley Gaffin, Esq. on 8/19/77 of Govts Memorandum by mail.	

9-6-77 Filed Notice of Readiness for Trial-
 Filed Superseding Indictment & referred to Tenney, J.
Broderick, J.
 09-08-77 Filed CJA Appt. for substituting counsel- Gerald Zuckerman, Esq.
 36 W. 44th St. NY, NY 10036-Tel: 682-5315 for prior counsel-
 Edson Reid. Gershon, Mag.
 09-12-77 Deft. (atty. Gerald Zuckerman) court directs entry of a plea
 of not guilty. Bail cont'd. \$35,000.
 09-26-77 Deft. (atty. Gerald Zuckerman) jury trial begun before Judge
 Tenney.
 09-27-77 Trial cont'd.
 09-28-77 Trial cont'd.
 09-29-77 Trial cont'd.
 09-30-77 Trial cont'd.
 10-03-77 Trial cont'd. & concluded. Deft. found guilty on each of cts.
 1 & 2. Sent. adj.'d until 11-14-77 at 10AM. Deft. remanded
 in lieu of bail previously fixed. Tenney, J.
 10-11-77 Filed deft.'s motion to set aside verdict.
 10-17-77 Filed Govt's requests to charge.
 10-17-77 Filed Govt's suppl. requests to charge.
 10-17-77 Filed Govt.'s voir dire.
 10-28-77 Filed memo-end. on motion docketed 10-11-77. The motion is
 denied. Tenney, J. m/n
 10-31-77 Filed Govt.'s memo of law re: opposition to deft's motion to
 set aside verdict of guilty in the charge if attempted
 bank robbery.
 11-1-77 Filed transcript of record of proceedings, dated 09-17, 14-77
 11-14-77 Filed JUDGMENT (atty. Gerald Zuckerman) cts 1 & 2 YOUNG
 ADULT OFFENDER for treatment and supervision pur to
 18:5010(b), Chapter 402 until discharged by the Fed. Youth
 Correction Division of the Board of Parole as provided in
 Section 5017(c) of T. 18 U.S. Code. Tenney, J. issued all
 copies
 11-14-77 Filed notice of appeal from judgment of 11-14-77. Mailed
 copies to Atty. & U.S. Atty.

A TRUE COPY
 RAYMOND E. BURGHARDT, Clerk
 By *[Signature]*
 Deputy Clerk

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

A-3

DOCKET ENTRIES FOR ERNEST GEORGE TEPPER

a/k/a "BORN FREEDOM"

07 08 77 0517

XX

03

77-824

BAIL - RELEASE

18:371

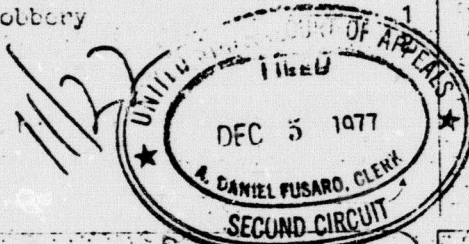
Consp. to commit bank robbery

18:371

Consp. to commit bank robbery

18:2113(a)

Attempted bank robbery



KEY DATES & INTERVALS

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began *6/30/77 Summons Served First Appearance 7/1/77	Information 7-8-77 Indict. Waived Supervising XX Indictments 9-6-77	7-14-77 7-14-77 Final Pledge LUNG LI G LING	Trial Set For X Trial Began Trial Ended 7-14-77	Disposition of Charges 1-15-77 On All Charges On Lesser Offenses WOP WP On Government's Motion
U.S. Custody Began Summons Served First Appearance 7/1/77	Information 7-8-77 Indict. Waived Supervising XX Indictments 9-6-77	7-14-77 7-14-77 Final Pledge LUNG LI G LING	Trial Set For X Trial Began Trial Ended 7-14-77	Disposition of Charges 1-15-77 On All Charges On Lesser Offenses WOP WP On Government's Motion

U.S. Attorney, S.D.N.Y.

Lee S. Richards
791-1989

X

Martin Rosen
277 Broadway, N.Y.C. 10007
CO 7-4314

Caldwell-01, Bonner-02

7/1/77 Deft. presented, CJA Martin Rosen 277 B'way NYC, Deft. remanded in lieu of \$15,000 C/S with PSA supervision.

7-8-77 INDICTMENT FILED, 77 CR 517Ward, J.

7-14-77 Deft. (atty. Dudley Gaffin present) pleads not guilty. Deft. continued remanded in lieu of Bail of \$15,000 cash or surety previously fixed by Magistrate. 10 days for motions. Case assigned to Tenney, J. for all purposes.....Ward, J.

07-20-77 Pre-trial conf. held. Trial 9-17-77 at 10AM. Tenney, J.

07-28-77 Filed appearance bond in the sum of \$15,000.

08-01-77 Filed remand dated 7-14-77. Deft. remanded to custody of U.S. Marshall in lieu of bail.

08-01-77 Temporary Commitment dated 7/1/77.

08-15-77 Filed Stip & Order that motion presently scheduled for 8/10/77, 9:30 be adjourned until 8/24/77, 9:30 A.M.

08-24-77 Filed Govt's Memorandum of Law in opposition to Deft. Tepper's omnibus

77-1474

John

8/26/77 Filed Notice of Motion by dft to dismiss the indictment
 8/26/77 Filed Memo and on entry dkt'd 8/26/77 re: motion denied. TENNEY, J.

8/77 Filed Notice of Readiness for Trial.
 9-6-77 Filed Superseding Indictment & referred to Tenney, J.
Frederick, J.
 9-15-77 Filed deft.'s notice of motion re: order granting in camera inspection of the Grand Jury Minutes and dismissing the indictment.
 9-15-77 Filed memo-end. on motion docketed this date. Motion denied. Tenney, J. m/n
 9-12-77 Deft. (atty. Dudley Gaffin) pleads not guilty. Bail cont'd. \$15,000. Tenney, J.
 9-12-77 Deft. (atty. present) hearing on deft.'s motion to suppress begun.
 9-14-77 Hearing cont'd. and concluded. Motion to suppress denied. Tenney, J.
 9-22-77 Filed OPINION # 46376... The motion to suppress is denied. Tenney, J. m/n
 9-26-77 Jury trial begun before Judge Tenney.
 9-27-77 Trial cont'd.
 9-28-77 Trial cont'd.
 9-29-77 Trial cont'd.
 9-30-77 Trial cont'd.
 10-03-77 Trial cont'd. & concluded. Deft. found guilty on each of cts. 1 & 2. P.S.I. ordered. Sent. adj.'d. until 11-14-77 at 10AM. Deft. cont'd. on his present bail until 4PM 10-3-77 to post bail increased to \$25,000. Tenney, J.
 10-04-77 Filed appearance bond in the sum of \$10,000.
 10-05-77 Filed ORDER that part of the bail conditions of deft.'s release be that deft. not make any attempt to contact any of the witnesses in the trial and that he stay away from the area within a three block radius of the European-American Bank, etc. Tenney, J. m/n
 10-17-77 Filed deft.'s memo. of law.
 10-17-77 Filed deft.'s notice of motion for severance.
 10-17-77 Filed deft.'s requests to charge.
 10-17-77 Filed Govt.'s requests to charge.
 10-17-77 Filed Govt.'s suppl. requests to charge.
 10-17-77 Filed Govt.'s voir dire.
 10-17-77 Filed deft. memo of law on the motion to suppress
 10-17-77 Filed deft.'s notice of motion to suppress evidence.
 10-25-77 Filed deft.'s voir dire.
 10-25-77 Filed Govt.'s voir dire.
 11-14-77 Filed JUDGMENT (atty. Dudley Gaffin) YOUTH OFFENDER on cts 1&2 for treatment and supervision pru. to Sec. 5010(b) Chapter 402 until discharged by the Fed. Youth Correction Division of the Board of Parole as provided in Se.5017(c) of T.18 U.S. Code. Tenney, J. issued all copies.

FILED	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

Ernest George Tepper

07 02 17 77 0517 03
 Y. 77 517 03
 Docket No. Def.

PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

(Document No.)

7

Filed deft.'s notice of appeal from judgment of 11-14-77.
 Mailed copies to U.S. Atty. & Atty.

(a) (b) (c) (d)

A TRUE COPY

RAYMOND F. BURGHART, Clerk

By

Deputy Clerk

INDICTMENT

LR:ee-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
UNITED STATES OF AMERICA, :

Plaintiff, :

- v - :

INDICTMENTNORMAN STANLEY CALDWELL, a/k/a :
"Alah Masha," a/k/a "Sha," IVAN : S 77 Cr. 517
KEITH BONNER, and ERNEST GEORGE :
TEPPER, a/k/a "Born Freedom", :Defendants. :
:-----xCOUNT ONE

The Grand Jury charges:

1. From on or about June 1, 1977 to on or about the date of the filing of this indictment, the defendants NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPER, a/k/a "Born Freedom", conspired with each other and with others to the Grand Jury unknown to commit offenses against the United States in violation of Title 18, United States Code, Sections 2113(a) and 2113(d).

2. It was part of said conspiracy that the defendants NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPER, a/k/a "Born Freedom", and others to the Grand Jury unknown, would by force, violence and intimidation, take and attempt to take, from the person and presence of others property and money belonging to and in the care, custody, control, management and possession of the European American Bank, 433 Broadway, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

3. It was further part of the said conspiracy that the defendants NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPER, a/k/a "Born Freedom", would, in committing the offense described in paragraph 1 above, assault persons and put in jeopardy the lives of persons by the use of a dangerous weapon or device, to wit a .22 caliber automatic pistol.

LR:ee-3

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about June 30, 1977, the defendants NORMAN STANLEY CALDWELL, a/k/a, "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPEL, a/k/a "Born Freedom", met in a park behind I.S. #72 near the Rochdale Mall, Jamaica, Queens.

2. On or about June 30, 1977, the defendants NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPEL, a/k/a "Born Freedom", got into a white Oldsmobile and drove to the vicinity of the European American Bank, 433 Broadway, New York, New York.

3. On or about June 30, 1977 the defendant NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha" went into the European American Bank, 433 Broadway, New York, New York.

4. On or about June 30, 1977 the defendant IVAN KEITH BONNER carried a .22 automatic caliber revolver in to a hardware store in the vicinity of the European American Bank, 433 Broadway, New York, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

1. On or about June 30, 1977 in the Southern District of New York, the defendants NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER, and ERNEST GEORGE TEPPEL, a/k/a "Born Freedom", unlawfully, wilfully and knowingly, by force and violence and intimidation, did attempt to take from the person and presence of others

LR:ee-3

money belonging to and in the care, custody, control, management and possession of the European American Bank, 433 Broadway, New York, New York, a bank the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

APPELLANT'S REQUEST TO CHARGE

Charge No. 4Substantial Step

The substantial step must be strongly corroborative of the firmness of the defendant's intent. The substantial step or steps must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendant's original plan. United States v. Mandujano, 499 F. 2d 370, 378 (5th Cir. 1974), cert. den., 419 U.S. 1114 (1975) see, United States v. Jackson, _____ F. 2d. _____ slip op. 4804, 4822 (2nd Cir. July 19, 1975).

Preparation to commit a crime is not sufficient to constitute a substantial step.

jke

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury, we have now come to that part of the case where all of the evidence is in, the lawyers have presented their arguments and you are about to exercise your final role, which is pass upon and decide the fact issues that are in this case.

But first I want to express my thanks to each of you for your faithful devotion to your duties in this case, your promptness and the close attention that you have paid to the witnesses and to the lawyers and the Court.

It is your responsibility to reach a just decision in the determination of the charges against these defendants, and I know that you will deliberate towards reaching a verdict fairly and honestly and conscientiously.

As jurors, I want to impress upon you that you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You resolve such conflicts as there may be in the evidence, and you draw the reasonable inferences that may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case, and it is your sworn duty to accept the law as I state it to you in these instructions, and to apply it to the facts as you find the

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2 facts to be.

3 Now, you are to perform this duty without bias
4 or prejudice to the defendants or to the Government. The
5 law does not permit jurors to be governed by sympathy or
6 prejudice or bias. Both the parties and the public as well
7 as the Court expect you to carefully and impartially con-
8 sider all the evidence in the case, follow the law as
9 stated by the Court, and reach a just verdict.

10 It is your duty as jurors to consult with one
11 another and to deliberate with a view toward unanimously
12 agreeing upon a verdict, if you can do so without violence
13 to your individual judgments and conscience.

14 With respect to any fact matter, it is your
15 recollection and yours alone that governs. Anything that
16 counsel, either for the Government or for the defense, may
17 have said with respect to matters of evidence, whether during
18 the trial in the form of a question, in argument, or in
19 summation, is not to be substituted for your own recollec-
20 tion of the evidence. So, too, anything the Court may have
21 said during the trial or may say in the course of these
22 instructions as to any matter in evidence is not to be taken
23 in place of your own recollection.

24 As I have instructed you during this trial, the
25 case must be decided upon the sworn testimony of the

1 jke

2 witnesses and such exhibits as were received in evidence.

3 In addition, let me point out that the fact that
4 the Government is a party, that is, that the prosecution is
5 brought in the name of the United States of America, entitles
6 it to no greater consideration than that accorded to any
7 other party to the litigation. By the same token, it is
8 entitled to no less consideration.

9 All parties, the Government and individuals
10 like, stand equal before the bar of Justice.

11 Now, before we consider the charge itself and
12 what is required to sustain it, there are certain preliminary
13 observations that are in order, certain principles of law
14 that are applicable in every criminal case and to which I
15 made reference at the time of your selection as jurors.
16 First, the indictment is imply an accusation, a charge. It
17 is no evidence or proof of the guilt of a defendant. It
18 is merely a means utilized by the Government to bring a
19 defendant before the Court. It is nothing more or less.
20 And you will not give any weight whatever to the fact that
21 an indictment has been returned against these defendants.

22 Now, the defendants have pleaded not guilty.
23 Therefore, the Government has the burden of proving by
24 competent evidence the charges made against them beyond a
25 reasonable doubt. Whether this burden is sustained does not

1 jke

2 depend upon the number of witnesses or the quantity of
3 testimony, but rather on the nature and quality of the
4 testimony and other evidence. It is a burden that never
5 shifts, and remains upon the Government throughout the
6 trial.

7 A defendant does not have to prove his innocence.
8 On the contrary, he is presumed to be innocent of the
9 accusations contained in the indictment.

10 The Government must prove his guilt beyond a
11 reasonable doubt.

12 As I told you at the start of this trial, this
13 presumption of innocence was in the defendant's favor then,
14 it was present during the entire course of the trial. It
15 is in the defendant's favor now, as I instruct you, and
16 remains in the defendant's favor during the course of your
17 deliberations in the jury room.

18 It is removed only if and when you, the members
19 of the jury, are satisfied that the Government has sustained
20 its burden of proving the guilt of the particular defendant
21 whom you are considering beyond a reasonable doubt.

22 We have heard quite a bit about reasonable
23 doubt, and before we turn to the specific charges in this
24 case, I want to define for you this fundamental term of law
25 which will be referred to frequently as I instruct you about

1 jke

2 those charges. What is a reasonable doubt? A reasonable
3 doubt is one which appeals to your reason, your judgment,
4 your common sense and your experience. It is not impulse,
5 whim or speculation. It is not an excuse to avoid the
6 performance of an unpleasant duty or sympathy for a defend-
7 ant. On the contrary, it is a doubt which a reasonable
8 person has after carefully weighing all of the evidence. A
9 reasonable doubt may arise not only from the evidence pre-
10 sented, but also from a lack of evidence. Since the burden
11 is always on the prosecution to prove the accused guilty of
12 every essential element of the crime charged beyond a
13 reasonable doubt, a defendant has the right to rely upon
14 the failure of the prosecution to establish such proof in
15 order to create a reasonable doubt.

16 So if after a fair and impartial consideration
17 of all the evidence in the case or the lack of it you can
18 honestly say that you have such a doubt as would cause
19 prudent persons to hesitate before acting in matters of
20 importance to themselves, then you have a reasonable doubt,
21 and in that circumstance it is your duty to acquit.

22 On the other hand, if after a fair and impartial
23 consideration of all the evidence you can honestly say that
24 you are satisfied of the guilt of the defendant, with such
25 conviction that you would be willing to act upon it in

1 jke

2 important weighty matters in the affairs of your own life,
3 then you have no reasonable doubt, and in that circumstance
4 it is your duty to convict.

5 If the jury feels that the evidence in the case
6 reasonably permits of two conclusions, one of innocence,
7 the other of guilt, then the jury must adopt a conclusion
8 of innocence and acquit.

9 One final word on this subject. Beyond a
10 reasonable doubt does not mean beyond all possible doubt.
11 If that were the rule, few persons, however guilty they
12 might be, would be convicted. Consequently the law in a
13 criminal case is that it is sufficient if the guilt of a
14 defendant is established beyond a reasonable doubt.

15 The indictment in this case contains two counts,
16 both of which you must consider.

17 The first count of the indictment charges that
18 from on or about June 1st, 1977 up to September 6, 1977,
19 the date on which the indictment was filed by a Federal
20 Grand Jury, the defendants Norman Stanley Caldwell, also
21 known as "Alah Masha," also known as "Sha," and Ernest
22 George Tepner, also known as "Born Freedom," unlawfully,
23 knowingly and intentionally conspired with others, including
24 Ivan Keith Bonner, to rob the European American Bank at
25 433 Broadway, New York, New York.

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2 Now, I should refer to this count as the con-
3 spiracy count.

4 The indictment further charges in Count 2 that
5 the defendants Norman Stanley Caldwell and Ernest George
6 Tepper, and Ivan Keith Bonner, attempted to rob a bank. It
7 charges that the defendants unlawfully, wilfully and
8 knowingly, by force and violence, and intimidation, did
9 attempt to take money belonging to and in the care, custody,
10 control, management and possession of the European American
11 Bank, 433 Broadway, New York, New York, and I should refer
12 to this count as the substantive count.

13 As I stated, each of these counts charges a
14 separate offense or crime. Each must be considered
15 separately, and you must find a separate verdict on each
16 count as to each defendant.

17 The indictment names three defendants in all.
18 They are, as I have said, Ivan Keith Bonner, Norman Stanley
19 Caldwell and Ernest George Tepper. Only Mr. Caldwell and
20 Mr. Tepper are on trial before you, and they are the only
21 persons whose guilt or innocence you must announce in your
22 verdict; although as I will explain to you shortly, in con-
23 sidering the guilt or innocence of each you may have to
24 determine the nature of participation, if any, of the other
25 named defendant.

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2 In the determination of innocence or guilt, you
3 must bear in mind that guilt is personal. The guilt or
4 innocence of each defendant on trial before you must be
5 determined separately with respect to him, solely on the
6 evidence presented against him or the lack of evidence.
7 The case of each defendant stands or falls upon the proof
8 or lack of proof of the charge against him and not against
9 somebody else.

10 Now, the first count of the indictment, namely
11 the conspiracy count, charges that the defendants Bonner and
12 Caldwell and Tepper violated Title 18 of United States Code,
13 Section 371, by conspiring to commit bank robbery, that is,
14 conspiring to violate Title 18 of the United States Code,
15 Section 2113A.

16 The conspiracy statute provides in pertinent
17 part that "If two or more persons conspire to commit any
18 offense against the United States and one or more of such
19 persons do any act to effect the object of the conspiracy,
20 each has violated the Federal Criminal Law."

21 I instruct you that a violation of the bank
22 robbery statute is an offense against the United States
23 within the meaning of this statute.

24 The conspiracy charge, as I have already told
25 you, is entirely separate and distinct from the charges made

1 jke

2 in the substantive count. This fact, however, does not
3 prevent you from considering proof of actual violations of
4 other laws as evidence that a conspiracy existed. In order
5 to find a defendant guilty of conspiracy as charged in the
6 first count of the indictment, you must find beyond a
7 reasonable doubt first, that sometime between June 1st, 1977
8 and September 6, 1977 an agreement existed between these
9 defendants or other persons; that it was part of this agree-
10 ment to take and attempt to take by force, violence or
11 intimidation, money from the European American Bank at 433
12 Broadway, New York, New York; that the defendant whom you
13 are considering knowingly and intentionally associated
14 himself with the conspiracy; and that one of the defendants
15 named in the indictment committed at least one of the overt
16 acts set forth in the indictment at or about the time and
17 place alleged.

18 And I will explain to you the matter of overt
19 acts in a few minutes.

20 What is a conspiracy? A conspiracy is a combination
21 or agreement of two or more persons by concerted action
22 to violate the law. A conspiracy has sometimes been called
23 a partnership in crime.

24 Now, to establish a conspiracy, the Government
25 is not required to show that two or more persons sat around

1 jke

2 a table and entered into a solemn compact or written con-
3 tract stating that they had formed a conspiracy to violate
4 the law. Indeed, it would be extraordinary if there were
5 such a formal or specific agreement.

6 Your common sense will tell you that when indi-
7 viduals in fact undertake to enter into a criminal con-
8 spiracy much is likely to be left to unexpressed understand-
9 ing. Thus, it is sufficient for the Government to show
10 that two or more persons came to a common understanding,
11 impliedly or tacitly, in any manner to violate the law.

12 Express language or specific words are not
13 required to indicate assent or attachment to a conspiracy.

14 Now, in determining whether there has been an
15 unlawful agreement, you may judge acts and conduct of the
16 alleged members of the conspiracy which are done to carry
17 out an apparent criminal purpose.

18 Often the only evidence available is that of
19 disconnected acts on the part of the alleged individual
20 conspirators, which acts, however, when taken together in
21 connection with each other and with the reasonable inferences
22 flowing therefrom, show a conspiracy or agreement to secure
23 a particular result.

24 Now, if upon consideration of all the evidence
25 you find beyond a reasonable doubt that the minds of at least

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2 two of the alleged conspirators met in an understanding way
3 and that they agreed to work together in furtherance of the
4 unlawful scheme alleged in the indictment, then proof of
5 the existence of the conspiracy is established.

6 Now while the indictment charges that the
7 conspiracy existed from on or about June 1st, 1977 and con-
8 tinuously thereafter up to and including September 6, 1977,
9 the date of the filing of these charges by a Federal Grand
10 Jury, it is not essential that the Government prove that
11 the conspiracy started and ended on or about those specific
12 dates. It is sufficient if you find that in fact the
13 conspiracy was formed and existed for some time within the
14 period set forth in the indictment and that at least one
15 overt act was committed in furtherance thereof within that
16 period.

17 A conspiracy, once formed, is presumed to have
18 continued until its objectives are accomplished or there is
19 an affirmative act of termination by its members or it is
20 otherwise terminated, as for example, by arrests.

21 So, too, once a person is found to be a member
22 of the conspiracy, he is presumed to continue his membership
23 until its termination, unless there is affirmative proof
24 offered of withdrawal or disassociation.

25 Now, we have covered the first element which you

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2 must find beyond a reasonable doubt, the existence of a
3 conspiracy, and we come to the second element, namely the
4 participation of a particular defendant in that conspiracy,
5 assuming you have found the existence of a conspiracy.

6 If you satisfy yourselves beyond a reasonable
7 doubt that the conspiracy as alleged in the indictment
8 existed, then you must next decide whether the defendant
9 whose guilt you are considering, unlawfully, wilfully and
10 knowingly participated in the conspiracy with the intention
11 of furthering its objectives. Mere knowledge of an illegal
12 act on the part of some other alleged co-conspirator is
13 not sufficient. Mere acting in a way which incidentally
14 furthers the purpose of the conspiracy, without knowledge
15 that a conspiracy exists, does not make a person a member
16 of the conspiracy.

17 The terms "unlawfully, wilfully and knowingly"
18 mean that you must be satisfied beyond a reasonable doubt
19 that the defendant knew what he was doing, and that he acted
20 deliberately and voluntarily as opposed to mistakenly or
21 accidentally or as a result of some coercion.

22 In determining whether a defendant became a
23 member of a conspiracy you must determine not only whether
24 he participated in it, but whether he did so with knowledge
25 of its unlawful purpose. Did he join with an awareness of

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2 at least some of the basic aims and purposes of the con-
3 spiracy?

4 Knowledge is a matter of inference from facts
5 proved. It is not necessary that the defendant be fully
6 informed as to the details of the scope of the conspiracy
7 in order to justify an inference of knowledge on his part.

8 To have guilty knowledge, the defendant need not
9 know the full extent of the conspiracy and all of its
10 activities and actors.

11 As I stated before, mere association with one
12 or more of the conspirators does not make one a member of
13 the conspiracy, nor is knowledge without participation
14 sufficient. What is necessary is that the defendant parti-
15 cipate with the knowledge of at least some of the purposes
16 of the conspiracy and with intent to aid in the accomplish-
17 ment of those unlawful ends. And to find that a defendant
18 was a member of the conspiracy you must find that the defend-
19 ant knew that its purpose was the robbery of the European
20 American Bank at 433 Broadway.

21 In determining whether a conspiracy existed, you
22 should consider the actions and declarations of all of the
23 alleged participants. However, in determining whether a
24 particular defendant was a member of the conspiracy, if any,
25 you should consider only his acts and statements. He cannot

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2 be bound the the acts or declarations of other participants
3 until it is established that a conspiracy existed, and that
4 he was one of the members.

5 When people enter into a conspiracy to accom-
6 plish an unlawful end, they become agents for one another
7 in carrying out the conspiracy. Hence the acts or declara-
8 tions of one in the course of the conspiracy and in fur-
9 therance of the common purpose are deemed to be the acts
10 of all, and all are responsible for such acts. Accordingly,
11 if you find in accordance with these instructions that the
12 alleged conspiracy existed and that some or all of the
13 defendants or alleged conspirators were participants in
14 it, then acts done and statements and declarations made in
15 furtherance of the conspiracy by the persons found by you
16 to have been members of the conspiracy may be considered
17 against the defendant whom you find was a member, even
18 though such acts or declarations were made in the absence
19 and without the knowledge of the defendant.

20 It is important to note that this principle
21 applies only to the acts and declarations done or made dur-
22 ing the continuance of the conspiracy and in furtherance
23 thereof, that is, to carry out an unlawful objective or pur-
24 pose of the conspiracy. It does not apply to acts or
25 declarations which do not have these characteristics.

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Now assuming first that you have found that the alleged conspiracy existed, and second, that as to the defendant whose guilt or innocence you are considering, you found that he was a member of that conspiracy, then you should go on to consider the requirement of an overt act.

An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, they may change their minds and do nothing to carry it into effect, in which event their agreement would not constitute an offense.

As is the case with some of the overt acts alleged in this case, an overt act need not be a criminal act; neither need an overt act be the very crime which is the object of the conspiracy.

The indictment charges the following overt acts. First, that on or about June 30, 1977, the defendants Norman Stanley Caldwell, Ivan Keith Bonner, and Ernest George Tepper, also known as "Born Freedom," met in the park behind IS 72, near the Rochdale Mall in Jamaica, Queens.

I should point out that Queens is not in the Southern District of New York.

Secondly, that on or about June 30, 1977, the

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2 defendants Norman Stanley Caldwell, also known as "Alan
3 Masha," also known as "Sha," Ivan Keith Bonner, and Ernest
4 George Tepper, also known as "Born Freedom," got into a white
5 Oldsmobile and drove to the vicinity of the European
6 American Bank, 433 Broadway, New York, New York, which I
7 instruct you is in the Southern District of New York; all
8 of Manhattan is in the Southern District of New York.

9 Third, that on or about June 30, 1977, the
10 defendant Norman Stanley Caldwell, also known as "Alan
11 Masha," also known as "Sha," went into the European American
12 Bank at 433 Broadway, New York, New York, and

13 Fourth, that on or about June 30, 1977, the
14 defendant Ivan Keith Bonner carried a .22 automatic caliber
15 revolver into a hardware store in the vicinity of the
16 European American Bank, at 433 Broadway, New York, New York.

17 Now, it is not necessary for the Government to
18 prove that each member of the conspiracy committed or
19 participated in any particular overt act since the act
20 of anyone done in furtherance of the conspiracy becomes
21 the act of all the other members.

22 Also, the Government is not required to prove
23 each of the overt acts as alleged in the indictment. It is
24 sufficient if it proves the commission at at least one of
25 the acts in the Southern District of New York, which, as I

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2 stated, includes Manhattan, at or about the time alleged,
3 and I should also state that the overt act need not have
4 occurred at the precise time or place alleged in the indict-
5 ment.

6 Now, finally, I instruct you that in order
7 for you to convict a defendant it is not necessary for you
8 to find that the conspiracy was successful in all or even in
9 any of the objectives.

10 Now let me turn to the substantive count. As I
11 mentioned earlier, this count must be given separate con-
12 sideration by you. These defendants are charged with
13 having violated Title 18 of the United States Code, Section
14 2113A, which provides in pertinent part that "Whoever by
15 force and violence or by intimidation attempts to take from
16 the person or presence of another any property or money or
17 any other things of value belonging to or in the care, cus-
18 tody, control, management or possession of any bank, is
19 guilty of a crime."

20 Section 3114F of Title 18 of the United States
21 Code defines the term "bank" to mean any bank, banking
22 association, trust company, savings bank or other banking
23 institution, organized or operating under the laws of the
24 United States, or any bank, the deposits of which are insured
25 by the Federal Deposit Insurance Corporation.

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2 So I should now read the substantive count of
3 the indictment:

4 The Grand Jury further charges that on or about
5 June 30, 1977, in the Southern District of New York, the
6 defendants Norman Stanley Caldwell, also known as "Alan
7 Masha," Ivan Keith Bonner, and Ernest George Tepper, also
8 known as "Born Freedom," unlawfully, wilfully and knowingly,
9 by force and violence and intimidation did attempt to take
10 from the person and presence of others money belonging to
11 and in the care, custody, control, management and possession
12 of the European American Bank, 433 Broadway, New York, New
13 York, a bank the deposits of which were then insured by
14 the Federal Savings and Loan Insurance Corporation.

15 Now, in order to find a defendant guilty on the
16 substantive count you must find the following facts beyond
17 a reasonable doubt. First, that on or about June 30, 1977,
18 the deposits of the European American Bank at 433 Broadway,
19 New York, New York, were insured by the Federal Deposit
20 Insurance Corporation.

21 Second, that on or about June 30, 1977, the
22 defendant whose guilt you are considering, specifically
23 intended to take and had the criminal purpose of taking
24 money from that European American Bank, which belonged to
25 or was in the care, custody, control, management or possession

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2 of that bank.

3 Third, that he intended to take that money from
4 the person or presence of one or more persons other than the
5 defendants by force and violence or by intimidation.

6 Fourth, that the defendant took a substantial
7 step or substantial steps in furtherance of his criminal
8 purpose, which strongly corroborates or supports that pur-
9 pose, and

10 Fifth, that the defendant acted unlawfully,
11 knowingly and wilfully.

12 Now, with respect to the first element of this
13 crime there appears to be no substantial dispute that the
14 deposits of the European American Bank are insured by the
15 Federal Deposit Insurance Corporation. The parties have
16 stipulated that the bank has such insurance. However, you
17 must still find this element beyond a reasonable doubt in
18 order to convict the defendants.

19 The second element concerning the defendants'
20 intent to rob the bank is really self-explanatory. You must
21 find beyond a reasonable doubt, to satisfy this element,
22 that the defendants actually intended to rob the bank, even
23 though the bank robbery was never consummated.

24 Now, as to proof of knowledge and intent, know-
25 ledge and intent exists in the mind. Since it is not possi-

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2 ble to look into a man's mind, to see what went on, the
3 only way you have for arriving at a decision in these ques-
4 tions is for you to take into consideration all the facts
5 and circumstances shown by the evidence, including the
6 exhibits, and to determine from all such facts and circum-
7 stances whether the requisite knowledge and intent were
8 present at the time in question.

9 Direct proof is unnecessary. Knowledge and
10 intent may be inferred from all the circumstances.

11 Now, with respect to the third element, a taking
12 by force and violence or intimidation, the Government is
13 not required to show that force and violence were actually
14 used against anyone if it proves beyond a reasonable doubt
15 that the planned taking was to be the result of intima-
16 tion, that is, the result of placing another person or
17 persons in fear.

18 Now, intimidation may be established by proof
19 of circumstances that are normally and reasonably calculated
20 to arouse fear in the ordinary run of human beings. So if
21 it happened that some extraordinary timid person was put in
22 fear by some sort of words or action, that would not nor-
23 mally frighten anyone, then this would not be the kind of
24 intimidation with which the statute is concerned. On the
25 other hand, if the proof shows conduct by a defendant which

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2 would normally be expected to generate fear, then it is not
3 necessary that those affected should actually have experi-
4 enced some terror or panic or hysteria.

5 The question, in short, in this respect is an
6 objective one. It is whether the Government has sustained
7 its burden of showing attempted or planned conduct of the
8 accused which was of such a nature as to be a sensible
9 and expectable basis for the creation of fear.

10 Now the fourth element you must find beyond a
11 reasonable doubt in order to convict is that the defendant
12 took a substantial step or substantial steps in a course of
13 conduct designed to accomplish the criminal result of rob-
14 bing the bank, and that such step or steps strongly corro-
15 borate or tend to prove the criminal purpose of robbing the
16 bank.

17 Merely preparing to do something is not an
18 attempt. The step or steps must be substantial and pur-
19 poseful, and not reasonably explainable except as steps
20 toward accomplishing the crime. A step itself need not
21 constitute an illegal act, but you must find it was taken
22 in furtherance of an illegal purpose.

23 I instruct you that among the acts which you
24 may find substantial and purposeful in this sense are first
25 reconnoitering or closely examining the place contemplated

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2 for the commission of the crime, that is, in this case the
3 area of the bank, and secondly, possessing materials to be
4 employed in the commission of the contemplated bank robbery,
5 which are expressly designed for the purpose of robbing the
6 bank or which can serve no lawful purpose of the defendant
7 under the circumstances.

8 In this regard you have heard evidence from
9 which the Government argues that the defendant Norman Stanley
10 Caldwell entered and examined the bank, and that he sat
11 outside the bank, that Caldwell, the defendant Ernest
12 George Tepper, and Bonner, drove around the bank several
13 times, that the co-defendant Bonner possessed such things
14 as a gun and surgical gloves; that both Caldwell and
15 Bonner had stockings on their heads; that a holster and
16 surgical gloves were found in defendant Tepper's car.

17 Now, as to the fifth element, the terms
18 "unlawfully, wilfully and knowingly," means that you must be
19 satisfied beyond a reasonable doubt that the defendant
20 whose guilt or innocence you are determining knew what
21 he was doing and that he did it deliberately and volun-
22 tarily as opposed to mistakenly or accidentally or as a
23 result of some coercion.

24 Of course, it is not necessary that the defendant
25 knew that he was violating any particular law. Rather, it is

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2 sufficient if you are convinced beyond a reasonable doubt
3 that he was aware of the general unlawful nature of his
4 act.

5 Furthermore, it is not necessary for the Govern-
6 ment to show that the defendant physically committed the
7 crime himself.

8 Section 2 of Title 18 of the United States Code
9 provides in pertinent part that whoever commits an offense
10 against the United States or aids, abets, counsels, commands,
11 induces or procures its commission is punishable as a
12 principal. In other words, a person who aids and abets
13 another to commit an offense is just as guilty of that
14 offense as if he committed it himself. Accordingly, you
15 may find the defendant Tepper guilty of the offenses
16 charged if you find beyond a reasonable doubt that Bonner
17 and Caldwell committed the offense and that the defendant
18 Tepper aided and abetted them. To determine whether a
19 defendant aided and abetted the commission of an offense,
20 you ask yourselves these questions: Did he associate himself
21 with the venture? Did he participate in it as something he
22 wished to bring about? Did he seek by his actions to make it
23 succeed? If he did, then he is an aider and abetter.

24 I want to emphasize, however, that mere
25 presence at the scene of a crime and knowledge that a crime

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2 is being committed are not sufficient to establish that
3 the defendant aided and abetted the commission of the crime
4 charged, unless you find beyond a reasonable doubt that the
5 defendant participated in or actually caused the commission
6 of the offense. Merely being a knowing spectator is not
7 sufficient.

8 Let me discuss briefly the matter of evidence
9 generally. I want to explain that there are two types of
10 evidence which a jury may properly rely on in deciding
11 the guilt or innocence of an accused. One is direct evidence,
12 such as testimony of a witness relating to what he heard or
13 saw, something he knows of through his own knowledge, which
14 bears directly on a fact issue in the case.

15 For example, testimony by a witness that he saw
16 a defendant in possession of an object is direct evidence
17 which if believed by the jury establishes the fact that the
18 defendant was in possession of the object.

19 The other type of evidence is circumstantial
20 evidence which is proof of a fact or circumstance from
21 which one may infer connected facts, which reasonably follow
22 in man's common experience.

23 Circumstantial evidence is that evidence which
24 tends to prove a disputed fact through proof of other
25 facts. To use a very simple example, if you look out of the
window and see it raining, then your statement that you see

1 like
2 rain coming down is direct evidence that it is raining.

3 However, if instead of looking out of the window
4 you see a succession of people coming inside with raincoats,
5 rubbers and umbrellas, each one dripping wet, then your
6 statement as to that observation is circumstantial evidence
7 of the fact that it is raining.

8 Now, circumstantial evidence is of no less value
9 than direct evidence, for as a general rule, the law makes
10 no distinction between direct and circumstantial evidence,
11 but simply requires that before convicting a defendant, the
12 jury be satisfied of the defendant's guilt beyond a
13 reasonable doubt from all the evidence in the case.

14 Now, there are times when different inferences
15 may be drawn from a different set of facts. An inference
16 is a deduction or conclusion which a juror is permitted to
17 draw from facts which have been established by either the
18 direct or circumstantial evidence introduced in the case.
19 But an inference is not drawn by speculation or guesswork;
20 but rather arrived at by an exercise of your reason and
21 common sense.

22 So while considering the evidence presented,
23 you are permitted to draw from the facts which you find to
24 have been proven such reasonable inferences as seem justi-
25 fied in the light of your experience.

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2 But here again, let me remind you that whether
3 based on direct or circumstantial evidence or the logical
4 reasonable inferences drawn from such evidence, you must
5 be satisfied of the guilt of the defendant beyond a reason-
6 able doubt.

7 Now, just as you are the sole judges of the
8 facts, so also you are the sole judges of the credibility
9 and truthfulness of each witness in this case. In weighing
10 the testimony of each witness, you should consider his
11 relationship, if any, to the Government or to a defendant,
12 the extent of the witness' interest, if any, in the outcome
13 of the case; his manner of testifying, his appearance and
14 conduct while on the stand, his intelligence, the strength
15 or weakness of his recollection and the extent to which
16 he's been corroborated or contradicted, if at all, by the
17 other credible evidence.

18 The ultimate question for you to decide in
19 passing upon the credibility of a witness is did the witness
20 tell the truth? And to this end you use your everyday com-
21 mon sense.

22 If you find that any witness has deliberately
23 testified falsely as to any material fact, you may disregard
24 all of his testimony or you may accept that part of his testi-
25 mony which you believe is truthful or which you find to be

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2 corroborated or supported by other evidence in the case.

3 Some of the witnesses called by the prosecution
4 where FBI agents, employees of the Federal Government, and
5 the New York City Police Officers. That a witness is
6 engaged in the service of the government does not mean that
7 his testimony deserves any greater weight than that of any
8 other witness. You appraise his testimony by the same
9 standards applied to any other witness to determine his
10 credibility, taking into account interest or any other fac-
11 tor which may have influenced him to color his story one way
12 or another.

13 You have heard testimony by certain Government
14 witnesses that the defendants made statements concerning
15 their participation in the offenses charged. If you find
16 that a defendant did make such a statement, then you may
17 give such statement or statements such weight as you believe
18 it deserves, after considering all of the circumstances
19 which were brought out in evidence.

20 You have heard evidence that the defendants
21 Bonner and Caldwell ducked into a hardware store and the
22 pistol was found down a stairway near where Bonner was
23 standing with Caldwell. If you find that any defendant fled
24 immediately after engaging in conduct that would be criminal
25 if done knowingly, such flight is a fact from which you may

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2 but need not infer a consciousness of guilt on his part.
3 It is evidence which you may consider along with all of
4 the other evidence in determining a defendant's guilty
5 knowledge. The weight and significance of the evidence,
6 of course, is for you and you alone to determine.

7 Now, there has been testimony that the defendants
8 made statements tending to show their innocence at the time
9 of their arrest. There has also been testimony from which
10 you might conclude that these statements were false. I
11 charge you that such statements when shown to be false are
12 circumstantial evidence of guilty consciousness and have
13 independent probative force.

14 There were certain statements made in summation
15 about the failure to call certain individuals as witnesses.
16 If a potential witness could have been called by the Govern-
17 ment or by the defendants and neither side called him, then
18 you may infer that the testimony of the absent witness might
19 have been unfavorable either to the Government or to the
20 defendants or to both of them, but on the other hand, it is
21 equally within your province to draw no inference at all
22 from the failure of either side to call a witness; and you
23 should bear in mind, however, that there is no duty upon
24 either side to call a witness whose testimony would be
25 merely cumulative of testimony already in evidence.

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2 Now, the law permits but does not require a
3 defendant to take the stand and testify in his or her own
4 behalf. The defendants have not testified in this case,
5 and this is their absolute right. They are not required
6 to do so. As I have told you, they do not have to prove
7 their innocence. The burden of proof is always on the
8 Government to establish the guilt of a defendant beyond a
9 reasonable doubt.

10 So in no respect may such failure to testify
11 be considered by you as any evidence whatsoever against
12 a defendant nor may it give rise to any basis for a pre-
13 sumption or inference unfavorable to him. You may not
14 permit such fact to weigh in the slightest degree against
15 a defendant, nor should it enter into your deliberations or
16 discussions.

17 Furthermore, certain statements were received
18 to the effect that the automobile was or resembled the auto-
19 mobile used in a prior bank robbery in that vicinity.

20 Now this was received solely to explain what
21 caused the making of the emergency calls to the police, and
22 it is not evidence, nor may it be considered as evidence that
23 these defendants participated in any such prior bank rob-
24 bery.

25 The attorneys in the case have entered into

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2 certain stipulations, one of which I mentioned with respect
3 to the bank being insured, and I believe there was another
4 stipulation with respect to the ownership of the automobile.

5 Stipulations, of course, are binding on the
6 parties who agree to them. And when the attorneys stipulate
7 or agree as to the existence of a fact, you must, unless
8 otherwise instructed, accept the stipulation and regard the
9 fact as proof.

10 I know you are aware that the chart that was
11 received in evidence was received with the understanding
12 that it did not represent exact measurements, it was not in
13 scale.

14 As I mentioned earlier, anything counsel either
15 for the Government or for the defense may have said with
16 respect to matters in evidence, whether during the trial,
17 in argument or in summation, is not evidence in the case.
18 So too anything that the Court might have said during the
19 trial or during the course of these instructions is not
20 evidence. This case must be decided by you solely on the
21 basis of the sworn testimony of the witnesses and such
22 exhibits as were received in evidence.

23 I have attempted to avoid any comment that might
24 suggest any personal views of mine on the evidence or on the
25 credibility of witnesses, inferences to be drawn or the

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2 importance of one part of the testimony as compared with
3 another, and no comment by me has been so intended. The
4 actions of the Court during the trial in ruling on motions
5 or objections are not to be taken by you as any indication
6 of the guilt or innocence of the defendants. These are
7 matters of procedure and law, with which you have no con-
8 cern.

9 From time to time conferences at the bench out
10 of your hearing were conducted, at the request of the
11 attorneys for the Government or for the defense. These
12 were conferences solely on questions of law which it is
13 my duty to decide.

14 You are not to draw any inferences against
15 either side to this controversy for requesting such con-
16 ferences because an attorney would be remiss in his duty
17 to his client if he did not protect his interests in the
18 manner provided by law which it is my function to decide.

19 Let me point out that the duty of imposing
20 sentence in the event of a guilty verdict rests exclusively
21 with the Court. The punishment which may be inflicted
22 upon a defendant must never be considered by you in any
23 way in arriving at an impartial verdict as to the guilt or
24 innocence of an accused.

25 Now, you are about to commence your delibera-

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2 tions. The purpose of your deliberations of course is to
3 exchange views with your fellow jurors, to discuss and
4 consider the evidence, to listen to each other's arguments,
5 present your own views, and to reach a unanimous verdict,
6 based solely and wholly on the evidence, if you can do so
7 without violence to your own individual judgment.

8 Each of you must decide the case for yourself.
9 But do so only after an impartial consideration of the evi-
10 dence in the case with your fellow jurors. Do not hesitate
11 to reexamine your views and to change your opinion when
12 after discussion it appears to be in error. But if after
13 carefully considering all of the evidence in the case and
14 the arguments of your fellow jurors you hold a conscious
15 view which differs from the others, you are not to yield your
16 view simply because you are outnumbered.

17 The final vote must reflect your objective and
18 conscious determination of the issues.

19 Now, if in the course of your deliberations
20 you need to examine any of the exhibits, I believe that I
21 will send all of the exhibits in right at the start, which
22 will avoid the necessity of your sending out a note.

23 But if you desire any of the testimony to be
24 read, although this was a reasonably short trial, or find
25 that you are uncertain as to the meaning of any part of the

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2 Court's instructions, you may send a note to the Court
3 through your forelady, Mrs. Giallorenzi, asking for what-
4 ever will clear up any of the questions you may have. In
5 communicating with the Court, however, I should admonish
6 you that you should not indicate how your vote may then be
7 divided.

8 In conclusion, your oath sums up your duty, and
9 that is without fear or favor to anyone, you will well and
10 truly try the issues between these defendants and the
11 Government of the United States based solely upon the evi-
12 dence and the Court's instructions as to the law.

13 It is important to the Government. It is
14 important to the defendants.

15 Counsel step up to the side bar.

16 (At the side bar.)

17 MR. ZUCKERMAN: If your Honor please, defendant
18 Caldwell respectfully excepts to the Court's charge insofar
19 as the Court's definition and instructions regarding the
20 crime of attempted robbery; insofar as the Court relied
21 upon United States against Jackson. Defendant Caldwell
22 again renews its request to the Court charge on attempted
23 robbery in accordance with United States against Mandujano.

24 THE COURT: You already have my ruling on that.

25 MR. GAFFIE: I join in that, and respectfully

MOTION TO SET ASIDE VERDICT (CALDWELL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- : 77 Cr.517 (CHT)

NORMAN STANLEY CALDWELL, et al. : MOTION TO SET ASIDE VERDICT

Defendants. :
-----X

The defendant Norman Stanley Caldwell respectfully moves this Court to set aside the jury's verdict of guilty as to the second count of the indictment for the following reasons:

The second count of the indictment charges that defendant and his co-defendants attempted to rob a bank in violation of Title 18 USC, Sects. 2113 (a) and 2.

The controlling law in this Circuit defining attempted bank robbery is set forth in United States v. Stallworth, 543 F.2d 1038 (1976) and United States v. Jackson, - F.2d - (July 19, 1977); slip op. 4805. Even though defendant Caldwell avers that the criteria set forth in these two cases for determining whether an attempted bank robbery has occurred is overly broad, the facts in the instant case are still nevertheless distinguishable.

The gravamen of Stallworth and Jackson cases is that once the criminal intent to rob a bank has been established, further substantial steps in furtherance of the plan which strongly corroborates the criminal intent to rob the bank constitutes an attempt to rob the bank. The point of inquiry "then is the substantiality of the steps taken on the dates in

question, and how strongly this corroborates the firmness of their obvious criminal intent" (United States v. Jackson, slip op. 4822). Possession of a weapon, mask, glove or other paraphernalia or conduct could then be considered as providing corroborative evidence. In Stallworth and Jackson, the criminal intent to rob the bank was beyond dispute, as informants testified to that effect. The jury only had to determine whether the overt acts of the conspirators went beyond preparation and constituted the required substantial steps for an attempt.

In the case at bar, however, application of the Stallworth and Jackson rule is inapposite and confusing. The various paraphernalia which were utilized in Stallworth and Jackson, separately as corroborative evidence, is here being used in a double capacity, i.e. to find initial criminal intent and then as a substantial step in furtherance of that intent. By the Court charging the jury in accordance with Stallworth and Jackson, defendant Caldwell was placed in a more difficult situation than the defendants in those two cases, and imposed upon him an impossible burden. Where separate evidence is employed to establish criminal intent, the jury could at least find a defendant guilty of a conspiracy to rob a bank and stop short of convicting of the more serious attempt to rob a bank. And this is precisely what occurred in the trial of Keith Bonner, the codefendant in this case. Bonner was tried separately because of the Bruton rule; his manifest culpability was established through his confession to the authorities. The jury convicted him of conspiracy to rob a bank, but could not agree on a verdict in regard to the count charging attempted bank robbery. Yet the anomalous situation has now been created whereby a different jury listening to substantially the same evidence used in the Bonner case, with the exception of Bonner's

confession, has convicted the remaining two codefendants of attempted robbery of a bank as well as conspiracy. The plain fact is that if a jury is to consider the same evidence to establish criminal intent and then as a substantial step in furtherance of the intent, no option is given to the jury to convict on one count or the other - the jury can only view the issue as a whole and either acquit or convict on both counts.

Dated: October 7, 1977
New York, New York

GERALD ZUCKERMAN
Attorney for defendant, Norman
Stanley Caldwell

GOVERNMENT'S MEMORANDUM IN OPPOSITION

LSR:1q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

:

- v -

:

S 77 Cr. 517 (CHT)

NORMAN STANLEY CALDWELL,

:

a/k/a "Alah Masha",

:

a/k/a "Sha", and

:

ERNEST GEORGE TEPPER,

:

a/k/a "Born Freedom",

Defendants.

:

-----x

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT
CALDWELL'S MOTION TO SET ASIDE
THE VERDICT OF GUILTY ON THE
CHARGE OF ATTEMPTED BANK ROBBERY

This memorandum of law is respectfully submitted in opposition to the defendant Caldwell's motion to set aside the verdict of guilty on Count Two of the indictment. Rule 29, Fed.R.Cr.P.

The sole issue raised on this motion is Caldwell's apparent claim that there was not sufficient evidence of an attempted bank robbery because the evidence of his criminal purpose to rob the bank was the same evidence that showed that he and his co-defendants had taken substantial steps

LSR:lq

toward accomplishing that purpose. He claims that United States v. Jackson, _____ F.2d _____, slip op. 4805 (July 19, 1977) and United States v. Stallworth, 543 F.2d 1038 (2d Cir. 1976) are distinguishable because in those cases the Federal Bureau of Investigation had statements from accomplices showing the defendants' criminal purpose before the defendants took the substantial steps toward achieving that purpose.

It is true that the Government in its case against Caldwell did not have any admission against him and was unable to introduce the statement made by his co-defendant Bonner. However, in arguing that such proof is necessary in order to convict anyone of attempted robbery Caldwell entirely misconstrues Stallworth, supra, and Jackson, supra. He would have this Court find that in any case where all the evidence admissible at trial amounts to substantial steps in an attempted bank robbery, that evidence, no matter how strong, is insufficient. He would have the Court disregard the evidence of substantial steps in determining whether there is ample evidence of criminal purpose. This is not the holding of either Stallworth or Jackson.

LSR:1q

In fact, it is clear that the principle purpose of requiring a finding of substantial steps is to insure that there be adequate evidence of the firmness of the criminal purpose. Indeed, the Comments to the Model Penal Code §5.01 (on which the present law on attempt in this Circuit was based) makes this clear:

Firmness of criminal purpose is intended to be shown by requiring a substantial step, while problems of proof are dealt with by the requirement of corroboration (although, under the reasoning previously expressed, the latter will also tend to establish firmness of purpose). Model Penal Code, §5.01, Comment at 47 (Tent. Draft No. 10, 1966).

After quoting this portion of the Comments the Court in Jackson, slip op. at 4821, supra, noted that

The draftsmen concluded that, in addition to assuring firmness of criminal design, the requirement of a substantial step would preclude attempt liability, with its accompanying harsh penalties, for relatively remote preparatory acts.

Accordingly, the reasoning behind the law in this Circuit and the appropriate section of the Model Penal Code is that the substantial step requirement is, at least in part, meant to insure that the proof of criminal purpose reach a certain level. The substantial steps are expected to be the most important proof of the criminal purpose.

LSR:1q

Moreover, there was important proof of Caldwell's criminal purpose independent of the proven substantial steps. The false exculpatory statements of Caldwell which were properly admitted at trial strongly establish Caldwell's criminal purpose. Likewise, his flight into the hardware store after seeing that his co-conspirator Tepper had been arrested and his co-defendant Bonner's attempt to discard the gun, tend to prove that criminal purpose. Thus, even if Caldwell's strange reading of Stallworth and Jackson were the law in this Circuit, that understanding of the law would not require the granting of the relief he seeks by this motion.

CONCLUSION

The motion of defendant Caldwell should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

LEE S. RICHARDS
Assistant United States Attorney

- Of Counsel -

JUDGMENT AND COMMITMENT ORDER (CALDWELL)

United States of America vs.

United States District Court for

THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT

NORMAN STANLEY CALDWELL

DOCKET NO. 61-77 Cr. 517 (CHT)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
NOV.	14	1977

COUNSEL

☐ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

GERALD ZUCKERMAN, ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea.☐ NOLO CONTENDERE.☒ NOT GUILTY

FINDING & JUDGMENT

There being a ~~verdict~~ verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, by force, violence and intimidation did attempt to take from the person and presence of others, money belonging to and in the care, custody, control, management and possession of the European American Bank, a bank the deposits of which were then insured by the Federal Savings and Loan Insurance Corp. (T. 18, U.S.C., Secs. 2113(a) and 2.), and conspiracy so to do. (Title 18, United States Code, Section 371.) as charged in counts 1 and 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General of the United States. As a YOUNG ADULT OFFENDER on counts 1 and 2 for treatment and supervision pursuant to Section 5010(b) of Title 18, United States Code, Chapter 402, until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Section 5017(c) of Title 18, United States Code.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

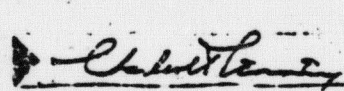
COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

U.S. District Judge



RECEIVED
NOV 14 1977

JUDGMENT AND COMMITMENT ORDER (TEPPER)

United States of America vs.

United States District Court for

THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT

ERNEST GEORGE TEPPER

DOCKET NO. 877 Cr. 517

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
NOV 14 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

DUDLEY GAFFIN, ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea.☐ NOLO CONTENDERE.☒ NOT GUILTYThere being a ~~guilty~~ verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, by force, violence and intimidation did attempt to take from the person and presence of others, money belonging to and in the care, custody, control, management and possession of the European American Bank, a bank the deposits of which were then insured by the Federal Savings and Loan Association Corp. (T. 18, U.S.C., Secs. 2113(a) and 2.) and conspiracy so to do. (Title 18, United States Code, Section 371.)

as charged in counts 1 and 2

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General ~~for treatment and supervision pursuant to Section 5010(b) of Title 18, United States Code, Chapter 402, until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Section 5017(c) of Title 18, United States Code.~~ As a YOUTH/OFFENDER on counts 1 and 2 for treatment and supervision pursuant to Section 5010(b) of Title 18, United States Code, Chapter 402, until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Section 5017(c) of Title 18, United States Code.SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATION

Bail continued pending appeal

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant to revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

CHARLES H. TENNEY

MICROFILM
NOV 1 1977It is ordered that the Clerk of the Court
a certified copy of this judgment
and commitment to the U.S. Marshal
or other qualified officer.

11/14/77

COPY RECEIVED
FEB 23 1978
U. S. ATTORNEY
SO. DIST. OF N. Y.